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Constitutional breakdowns in revolutionary outbreaks : the case of Egypt in February 2011

As any social phenomenon the revolution can be understood materially or formally. Materially, the term refers to the purpose of change, whether in "the dominant values and myths of a society, in its political institutions, social structure, leadership or government activity and policies"¹. Formally, the revolution indicates the process through which the change occurs. Charles Tilly's notion of revolutionary situation thus refers to a period during which the state is the object of competing claims by coalitions of actors each supported by a significant fraction of the population².

We will refer here to the formal understanding of revolution. It is a stipulative choice³, in the sense that we don't value more the formal revolution than the material revolution as a scientific topic, but simply that it will be useful to our demonstration.

The studied phenomenon will be a moment in the revolutionary situation, its beginning, what we call the revolutionary outbreak. This is the first episode, the one during which the old order collapses and where simultaneously the competition for the reformation of a new order begins.

It is what sometimes history remembers as having been "the Revolution"; "The July Revolution", the 3 days that led to the fall of Charles X; "The February Revolution", the 8 days which preceded the abdication of Tsar Nicolas II ; or, "The Jasmine Revolution", the four weeks which resulted in the departure of Ben Ali.

These revolutionary outbreaks will be viewed as political crisis periods, as understood by the French sociologist Michel Dobry. For actors, political crisis are characterized by structural uncertainty associated with a disruption of ordinary social functioning. Social conflictuality is no longer confined to relatively autonomous sectors but plays out on a global scale. This decompartmentalisation push actors to depart from their ordinary way to understand reality, and thus to redefine on a tenuous basis calculations they operate before acting⁴.

This social disruption does not mean an absence of law as though thinks Carré de Malberg⁵. Such an assumption equates the nature of law with the purpose of its producers, which is only contingent. Put differently, law is above all a political tool

¹ Samuel Huntington, *Political Order in Changing Societies*, New Haven, Yale University Press, 1968, p. 264.

² Charles Tilly's conception of revolution is in reality transcendental, in that it includes both its material and formal dimensions. The distinction is articulated around temporality, as the revolutionary situation ends or not with a "material" revolutionary outcome. Charles Tilly, *From Mobilization to Revolution*, London, Longman Higher Education, 1979, c. 7.

³ Troper Michel, « Les théories volontaristes du droit, ontologie et théorie de la science du droit », in Amselek Paul (dir.), *Controverses autour de l'ontologie du droit*, Paris, PUF, 1989, p. 55.

⁴ DOBRY, Michel, *Sociologie des crises politiques*, 3ème ed. Paris, Presses de Sciences Po, 2009.

⁵ "During political upheavals resulting from a revolution or a coup, there is neither legal principles nor constitutional rules: we are no longer in the domain of law, but in the domain of sheer force." CARRE DE MALBERG, Raymond, *Contribution à la théorie générale de l'Etat*, (t.2), Paris, Librairie de la Société du recueil Sirey, 1920, p. 496.

that may or may not produce effects. As a consequence, social disorder does not exclude the legal phenomenon.

On the contrary, it may even attract it. This is due to external characters of the legal discourse which turns it into an excellent instrument for return of order. As it is a prescriptive discourse, one can understand that actors can try to regulate a situation which get out of their control. Because this is a discourse referring ultimately to a transcendental will, that of the people⁶, it can be used for incantatory purpose in order to settle the political crisis in favor of the speaker. The neutral form of the legal discourse⁷ can be used to calm the emotions which feed the revolutionary situation. As for its impersonal character⁸, it may minimize the risk of acting, as in case of mishaps actors can hide behind the imperative of obedience to law.

But here we will focus on the internal properties of the legal discourse. Indeed, law constitutes a universe of meaning with its content, its rules and its own methods of reasoning, ie justification by empowerment and compatibility⁹. In that sense, the legal discourse carries an habitus¹⁰, or trivially said a culture, that can allow institutional actors to reconstruct their sector. This recompartimentalisation effect of the legal discourse is all the more pronounced as it presents itself as autonomous and scholarly informed¹¹. Legal statements can then be a medium of communication between institutional actors in times of political crisis, especially when the situation asks for emergency actions or renders physical meetings difficult. Legal discourse components allow the reconstruction of an intelligibility and accordingly enable actors to reformulate strategies possibly through anticipation of a cooperation with other institutional actors.

It will be here illustrated by focusing on phenomena of breakdowns in constitutional legality, what Hans Kelsen calls "legal revolution"¹² or Olivier Beaud "moment déconstituant"¹³.

The notion of breakdown will be defined based on the premises of French legal realism, such as developed by Michel Troper. His theory is centered on actors in that Troper considers the legal system as a system of justification¹⁴. Moreover, it is realistic insofar as constitutional law is not confined to the written text of the Constitution but to all norms considered by actors as falling within the constitutional domain, such as

⁶KLEIN, Claude, *Théorie et pratique du pouvoir constituant*, Paris, PUF, Coll. Les voies du droit, 1996, 232 p.

⁷BOURDIEU, Pierre, « La force du droit : Eléments pour une sociologie du champ juridique », *Actes de la recherche en sciences sociales*, 1986, Vol. 64, p.5.

⁸ *Ibid.*

⁹"Modern positive law is a system both static and dynamic, since all decisions are always justified both by their compliance with the content of another statement and the authorization given to its author, that is to say in the name of truth and of an higher authority. " TROPER, Michel, *Pour une théorie juridique de l'Etat*, 1994, Paris, PUF, Coll. , p. 175.

¹⁰ BOURDIEU, Pierre, *Le sens pratique*, 1980, Paris, Editions de Minuit, 480 p.

¹¹ BOURDIEU, Pierre, « La force du droit : Eléments pour une sociologie du champ juridique », *op.cit*, p.1.

¹²"The revolution [...] is any change in the constitution or any change or substitution of the constitution [...] that are not operated in accordance with the constitution in force." Kelsen, Hans, *Pure Theory of Law*, 1999 LGDJ, p.209.

¹³ BEAUD, Olivier, *La puissance de l'Etat*, Paris, Presses Universitaires de France, 1994, p.265..

¹⁴ See above.

customs and interpretations of constitutional texts by constitutional courts¹⁵. Thus, rupture in constitutional legality occurs, when an actor adopts a norm falling within the constitutional domain without justifying its production through reference to existing constitutional law.

Considering an act of discontinuity as a legal act may seem paradoxical. But one must distinguish the legal character and legality, and an illegal act may also constitute an act with a legal character, in that it reveals a positioning of the actor towards the legal system.

What message sends to other institutional actors the author of the constitutional breakdown ? Does it matter that the act explicitly attack the normative force of the Constitution to which are attributed all the norms of the constitutional system ? May the reaction of other institutional actors with respect to this breakdown may also be "meaningful" ? The relevance of these issues will be shown through a study of the Egyptian case and the outcome of the political crisis that was the "Revolution of 25 January 2011".

The "Revolution" was initiated by young activists who called for a demonstration on January 25, 2011. Following their success, most of opposition actors joined the movement, and Mubarak's regime reacted first exclusively through repression. Then it engaged concurrently into a de-escalation strategy through institutional concessions: appointment of a vice-president, Mubarak's commitment to not run in the next presidential elections, formation a committee to review the constitution ... Both options failed to contain the uprising which even intensified through strikes widely followed throughout the country¹⁶. The army, which had until then adopted an impartial posture¹⁷, intervened directly on 11 February.

It first adopted an act breaking with constitutional legality without directly attacking the 1971 Constitution (Part I). The military's initiative was recognized few hours later by President Mubarak through his resignation (Part II). It is only two days after that the army explicitly put out of force the 1971 Constitution (Part III).

I – The army's constitutional break : the "Declaration" of February 11

The act initially breaking the constitutional order was dated February 11, 2011 and issued by the Supreme Council of Armed Forces (SCAF)¹⁸. The military adopted a norm in the domain of constitutional law, while it had no competence to do so (Paragraph 1), and without trying to justify itself legally (Paragraph 2). This decision seemed to be designed to optimize the military's leeway in the management of subsequent events (Paragraph 3).

A- SCAF's absence of constitutional competence

¹⁵The term constitutional law here refers to what Michael Troper means by "constitutional system", ie the set of norms considered by Egyptian actors as materially constitutional. TROPER, Michel, *La constitution comme système juridique autonome*, *Droits*, 2002, vol. n° 35, n° 1, p. 65.

¹⁶For a social history of the revolutionary outbreak EL-CHAZLI, Youssef, « On the Road to Revolution », trad. Jasper Cooper, *Revue Française de Science Politique*, vol. n°62, n°5, pp.843-865.

¹⁷In reality the army had alternated between pledges to protesters and the regime. BISHARA, Dina et ALBRECHT, Holger, « Back on Horseback: The Military and Political Transformation in Egypt », *Middle East Law and Governance*, 2011, vol. 3, n° 1, pp. 13-23.

¹⁸ Declaration n° 2 of the Supreme Council of Armed Forces, 11 February 2011.

Through the Declaration of 11 February 2011, the SCAF modified the organization of public authorities of 1971 constitutional system. It vested itself with the responsibility of "ensuring the implementation"²¹ (*daman tanfiz*) of a series of measures: the end of the state of emergency²², legislative amendments, free and fair presidential elections, judicial decisions and their execution in the context of litigation over 2010 parliamentary elections²³ and a constitutional review.

The Declaration of 11 February 2011 was breaking with existing constitutional law, which not only did not recognize SCAF's power to change the organization of public authorities, but did not even recognize its existence, as the 1971 Constitution referred to another military body, the National Defense Council (*Majlis al-difa' al-watani*)²⁵. The SCAF existed in Egyptian law only through legislative reference. The text was dealing with the direction and the organization of armed forces, and stated that the SCAF was competent to "study all important issues and make decisions about these domains"²⁶. This provision was not considered as including the modification of the functioning of public authorities even in exceptional situations²⁷, and was regarded as relating exclusively to armed forces' internal affairs, as mentioned in the presidential decree defining SCAF's prerogatives²⁸.

Moreover, the SCAF had never interfered in politics, so no one could argue that it acted according to a custom. If the SCAF held no power to modify the organization of public authorities, it did not even try to justify this normative creation through reference to existing constitutional law.

B - The absence of justification vis-à-vis constitutional law

In addition to the fact that the Declaration of 11 February 2011 was not the implementation of a competence that the SCAF held under Egyptian constitutional law, another element was reflecting military's willingness to break with the constitutional system of 1971 Constitution. The army did not even attempt to justify its decision, whereas several statements of the constitutional system could have accomplished such a function.

²¹ Preamble of the Declaration n°2 of the Supreme Council of Armed Forces, 11 February 2011 : "Given the evolution of current events upon which rely the fate of the country, and in the framework of internal and external events, and the decision to delegate powers to the vice president of the Republic and the belief in our national responsibility to preserve its stability and security of, the Supreme Council decided ...".

²² The state of emergency had been continuously in force since the beginning of the mandate of Hosni Mubarak in 1981. Unlike other countries state of emergency's regime was set in the constitution (Article 148 of 1971 Constitution).

²³ Courts decisions had canceled the results of the 2010 parliamentary elections won by Mubarak's party but these decisions had not been enforced..

²⁵ The National Defense Council, mentioned in Article 182 of the Constitution of 1971, was composed of military personnel and civilians, including the president of the Republic, and was competent to examine all issues concerning the safety of the country.

²⁶ Article 10 of Decree Law n° 4 of 1968 on the management and control of the army affairs.

²⁷ On this issue see AHMAD RAHGEB, « Men yuhasib al-Majlis al-'askari », *Jadaliyya*, 21 mai 2011.

²⁸ Decree n° 365 of 1989 on the powers of the Supreme Council of the Armed Forces.

Firstly, the SCAF did not rely on the constitutional text. However, the article 180²⁹ of 1971 Constitution was identifying the people with the army and could have justified the SCAF's decision, for example in the name of popular sovereignty mentioned in Article 73. The army's choice to not rely on the constitutional text was all the more so noteworthy that the Declaration of 11 February 2011 was referring to the fulfillment of "the legitimate demands of the people" to justify the intervention of the military³⁰.

Secondly, the SCAF did not resort to the theory of exceptional circumstances, yet entrenched in Egyptian constitutional law through several provisions of the Constitution³¹. The military could have invoked it to argue that their breakout of constitutional legality was consistent with constitutional law, to the extent that the theory of exceptional circumstances enables to justify the implementation of "abnormal" legal regimes to situations deemed extraordinary³². Despite the fact that the Declaration contained language referring to exceptional circumstances, such as "current events upon which rely the fate of the country", the military did not explain how such events justified the adoption of decisions violating constitutional law neither why it was legitimizing their exit of constitutional legality.

SCAF's refusal to connect with the Egyptian constitutional system seemed designed to maximize its leeway to manage the following events.

C - Optimizing the military's leeway

Here we will discuss why the SCAF, which rejected the constitutional system, did not go the whole way and did not explicitly announced the repeal or the suspension of the 1971 Constitution.

By refusing to connect its Declaration with constitutional legality, the army appeared as asserting its power towards bodies of the 1971 Constitution. The SCAF announced its intent to deal with the difficult political situation created by the popular protest movement against Mubarak regardless of their power. The army thus showed its sovereignty, giving a strategic dimension to Schmitt's idea that the sovereign is the one who decides over the suspension of the constitution³³. Indeed courts and political bodies could have invoked the unconstitutionality of army's takeover, but by acting without reference to constitutional law the SCAF signaled preventively that it would consider such arguments as inadmissible.

The non-explicit repealing of the constitution may also have been a precautionary decision. In the event that the military would have then be accused of "betraying" the constitution, they could have hide behind the absence of explicit attack on the normative force of the text in order to argue *a posteriori* the constitutionality of the Declaration, by citing for example the theory of exceptional circumstances mentioned

²⁹ Article 180 of the 1971 Constitution: " The State alone shall establish armed forces which owe their allegiance to the people. "

³⁰ Article 2 of the Declaration n° 2 of the Supreme Council of Armed Forces, 11 February 2011: "The armed forces are committed to support the legitimate demands of the people and to implement them accurately and seriously in a defined time frame, until the peaceful transfer of power towards the free democratic society to which people aspire ".

³¹ See below.

³² D. Baranger, « L'état d'urgence dans la durée », *Revue française de droit administratif*, 2016, n°3, p. 453.

³³ SCHMITT, Carl, *Théologie politique*, Paris, Gallimard, Coll. Bibliothèque des sciences humaines, 1988, p.67.

above. Moreover, by maintaining the 1971 Constitution, the army preserved its legal options to manage the ongoing political crisis, including the possibility of relying on the provisions of constitutional law associated with this document.

In short, the army's Declaration of February 11 characterized by the paradox of a clear desire to break with the constitutional legality while not attacking explicitly 1971 Constitution, was designed to expand its legal leeway in an uncertain political situation. The strategy was to be free of the constraints of positive constitutional law, while preserving its ability to use afterwards this law if necessary. The act of the military and its strategy were recognized by President Mubarak in the announcement of his departure from power.

II – The break's recognition : Mubarak's resignation on February 11

A few hours after the SCAF declaration, vice president Omar Suleiman³⁴ announced on television that President Hosni Mubarak had "decided to abandon (*takhliya*) his position and vested the SCAF with the authority to administer (*idara*) the country's affairs." We interpret this decision as an acknowledgment of the setting aside of the 1971 Constitution, as it manifested president's will to not refer to existing constitutional law. Not only Hosni Mubarak violated constitutional provisions relating to the departure of the president (Paragraph 1), but he also transferred a power he had no power to vest (Paragraph 2), without even trying to justify himself in relation to "constitutional legality" (Paragraph 3). This act appeared designed to set the basis for a potential return in power (Paragraph 4).

A - A departure from power outside the framework of constitutional law

The 1971 Constitution contained a provision stating the procedure in case of voluntary departure of the president of the Republic. It appeared in Article 83:

In case of resignation, the President shall address the letter of resignation to the People's Assembly.

Mubarak's decision was not connected to this article, and in a striking manner. First, he did not resign (*istiqala*), but announced the abandonment of his office (*takhliya*)³⁵. Then, he did not leave power in accordance with the aforementioned procedure, that is to say by sending a letter of resignation to the lower house, the People's Assembly (*Majlis al-Sha'b*). His departure did not even obey any formalities. That was not only the departure of Hosni Mubarak which was outside the constitutional framework, but also the transfer to the SCAF of the authority to "administer the country's affairs."

B - A transfer of power to the SCAF outside the constitutional framework

³⁴Hosni Mubarak appointed a vice-president for the first time of his mandate at the beginning of the revolutionary movement. He endowed, Omar Suleiman, then director of the intelligence services, with the mission to discuss with all political actors in order to agree on legislative and constitutional reforms. Al-Yum Al Sabi', January 31, 2011.

³⁵Curiously this subtlety was not noted by the legal literature on the 25 January Revolution. See for example MALLAT, Chibli, WAGENBERG, Maria Van, ABDELKARIM, Mostafa et SIMCOCK, Julian, « Revising Egypt's Constitution : A Contribution to the Constitutional Amendment Debate », *Harvard International Law Journal*, 2011, n° 52, pp. 183-203 ; BROWN, Nathan J, « Egypt's Failed Transition », *Journal of Democracy*, 2013, vol.4, n° 24, pp. 45-58 ; RAYNAL, Pierre-Marie, « Révolution et légitimité : La dimension politique de l'excursion sociologique du droit constitutionnel », *Juspoliticum*, 2012, n° 7.

As for the second part of Mubarak's decision, which conferred the SCAF the authority to run the country's affairs, it also reflected the president's willingness to set aside the constitutional framework.

First, by vesting the military with such a power, Mubarak ignored the provisions governing the presidential interim, which were applicable in case of vacancy or temporary incapacity of the president. The first provision specified that the interim had to be exercised by the president of the People's Assembly until the organization of presidential elections within 60 days³⁶, and the second that in case of temporary incapacity, the president must delegate his powers to the vice-president³⁷.

If we consider this decision as a creation of a prerogative for the SCAF, it must be stressed that the Egyptian constitutional law did not confer to the president the ability to unilaterally amend the 1971 Constitution³⁸. Moreover if one considers this decision as a delegation of presidential powers, such a delegation was only recognized to the benefit of the vice-president³⁹ and was strictly constrained by the High Constitutional Court (*al-al-mahkama dusturiyya al-'ulya*)⁴⁰. Finally, assuming that Egyptian constitutional law authorized the president to delegate prerogatives to any organ, the decision did not fit the notion of delegation in its common legal sense, which conceives it as a power transfer from one authority to another. Indeed, no statement in constitutional law did vest the president with the authority he delegated, namely that of "administering the country's affairs."

The allocation of power to the military and Mubarak's departure, not only did lie outside the constitutional system, but also were not accompanied by a discourse aimed at justifying these "normative creations" in relation to constitutional law.

C - The absence of justification vis-à-vis constitutional law

This absence of compliance and compatibility to constitutional law was not counterbalanced by a justification effort to present this decision as "constitutional". Mubarak's decision, as read by his vice-president Omar Suleiman, was laconic and contained no motives nor contextualization. As the army, the president did not use the notion of "exceptional circumstances", despite the situation of socio-political turmoil. One must also note that the president did not resort to the emergency powers mentioned in the article 74 of 1971 Constitution⁴¹, which could have yet reconnected

³⁶ Article 84 of the 1971 Constitution.

³⁷ Article 82 of the 1971 Constitution.

³⁸ The authority to review 1971 Constitution implied the joint participation of the president, the lower chamber and the electoral body (art. 189).

³⁹ Article 82 of the 1971 Constitution in case of temporary incapacity of the president. Article 139 of the 1971 Constitution in ordinary circumstances

⁴⁰ BERNARD-MAUGIRON, Nathalie, *Le politique à l'épreuve du judiciaire: La justice constitutionnelle en Égypte*, Bruxelles, Bruylant, 2004, p. 108.

⁴¹ Article 74 of the 1971 Constitution " If any danger threatens the national unity or the safety of the motherland or obstructs the constitutional role of the State institutions, the President of the Republic shall take urgent measures to confront this danger after consulting the Prime Minister, the Speakers of the People's Assembly and the Shura Council, address a message to the people and conduct a referendum on the measures taken within sixty days of their adoption. The People's Assembly and the Shura Council may not be dissolved during the exercise of these powers."

his decision to constitutional legality. This “aconstitutional” behavior seemed to outline a strategy of return to power.

D - Legitimizing a return to power

What meaning could we attribute to Mubarak’s decision to extract himself from the constitutional framework ? The first interpretation is socio-political: Hosni Mubarak realized the weakness of his position in the balance of power. He handed over power to the military, which intervened in support of the protesters. The former president also complied with the street demand which required his immediate departure from power, and whose anger was not only directed towards him but towards the entire political system associated with his rule. This opposition rendered likely rejection by protesters of the constitutional solutions for presidential replacement namely, as we saw above, namely the vice-president Omar Suleiman, and the speaker of the People's Assembly, Ahmad Fathi Sorour. The two were associated with Mubarak's authoritarian regime. The former was the director of intelligence services. The second was member of the president's party, the National Democratic Party (*al-Hizb al-watani al-dimuqrati*), and showed great complacency towards the president during while chairing the lower house⁴³.

This sociopolitical interpretation may be completed with a legal analysis of the decision in relation to the SCAF's Declaration of 11 February. Through this decision, the military had expressed their willingness of not to be constrained by the constitutional system in their management of the transition period.

Mubarak’s departure can be analyzed as going in the same direction, since he also freed himself of the constitutional law associated with 1971 Constitution. In doing so, the president could not ignore he was consolidating the legal effects of the breakdown of constitutional order desired by the army, especially as Mubarak was the most powerful actor of the constitutional system associated with the text⁴⁴. Furthermore, by vesting the SCAF with the authority of “administering the country's affairs,” Mubarak was renouncing to the “legal” transition plan that he had presented the previous day, in which he had delegated all his powers to vice-president Omar Suleiman⁴⁵.

This analysis leads to an hypothesis highlighting another legal dimension of Mubarak’s decision. Assuming that his political will was to remain or, put differently, to “preserve its institutional existence⁴⁶”, then this act might reveal a strategy to return to power once the military would have stabilized the revolutionary situation. The fact that the 1971 Constitution’s repeal was only implicit in the army’s Declaration would not have been unnoticed by Hosni Mubarak. If the military “resurrected” the constitution, Mubarak’s return to power could be justified more convincingly, since his decision to step down had been taken outside the constitutional framework. From

⁴³See Kienle, Eberhard, *A Grand Delusion: Democracy and Economic Reform in Egypt*, London, I.B Tauris, 2001, p.. 64-68.

⁴⁴On the role of the president of the Republic in the regime associated with 1971 Constitution see EL-GHAFLOUL, Eid Ahmed, « Pouvoir exécutif et processus législatif en Égypte », *Égypte/Monde arabe*, 2005, vol 2, n° 2, pp. 105-132 ; BERNARD-MAUGIRON, Nathalie, “Strong presidentialism: the Model of Mubarak's Egypt,” in Grote, Rainer and RÖDER TJ (eds.), *Constitutionalism in Islamic countries: Between Upheaval and Continuity*, New York, Oxford University Press, 2012 pp . 373-385.

⁴⁵ Al-Yum Al Sabi', February 10, 2011.

⁴⁶ TROPER, Michel et CHAMPEIL-DESPLATS, Véronique, Proposition pour une théorie des contraintes juridiques, *op.cit.*, p. 15

this viewpoint, the use of the term "abandonment" in his act of resignation was revealing a hope of (re)investing the office of president. The acknowledgment of the sidelining of 1971 Constitution by the deposed president however contributed to the opposite as the military confirmed the breakdown of constitutional legality by attacking explicitly the normative force of the 1971 Constitution.

III – The explicit suspension of 1971 Constitution by the military: February 13 “Constitutional” declaration

Two days after its first declaration and Mubarak’s departure, the SCAF, in point 1 of a new declaration qualified as constitutional (*bayan dusturi*), announced that "the provisions of the Constitution were suspended" (*ta'til al-amal bi-ahkaam al-dustur*). Why did the military explicitly state the break with 1971 Constitution, while they had not done so two days earlier? A response lies in the temporality of the revolutionary situation, by considering this act as an articulation between its past and future. On the one hand, the military took note of the reactions to its break with constitutional legality as expressed in the 11 February 2011 Declaration. In this sense the Constitutional Declaration reflected the success of their intervention (Paragraph 1). On the other hand, the Constitutional Declaration contained provisions for a temporary organization of public authorities, that the explicitation of the put out of force of 1971 Constitution was designed to affirm (Paragraph 2).

A – Acknowledging the constitutional outbreak’s success

As seen above, the absence of explicit attack on the normative force of 1971 Constitution by the Declaration of 11 February 2011 could be analyzed as the application of a precautionary principle. The military intended to safeguard the possibility of justifying *a posteriori* the constitutionality of its decision, in case some actors would have wanted to sanction it for breaking with constitutional legality.

During the two days which separated both declarations, the army’s intervention raised no negative reaction. On the contrary, it was greeted by the participants in the 25 January Revolution, who rejoiced of Mubarak’s overthrow⁸, and even recognized by the deposed president himself as seen above. Furthermore, other authorities remained silent, probably for the judicial bodies as a matter of prudence and for the chambers because of their discredit due to their close association with Mubarak’s regime. All these reactions could be interpreted by the SCAF as a consent, allowing it to confirm the break with constitutional legality and announce the suspension of 1971 Constitution.

This clarification could also be aimed at strengthening the first organization of public authorities of the transitional period, whose content was also outlined in the Declaration of 13 February 2011.

B - Affirming the first provisional organization of public authorities

⁸Just after the revolutionary outbreak, the dominant discourse was that the military had sided for the people in order to overthrow Mubarak. This association of the military with the “Revolution” was epitomized by the diffusion of pictures of protesters falling into the arms of the soldiers the day of the announcement of Mubarak’s departure.

The suspension of the 1971 Constitution could be understood in the light of the other provisions of the "Constitutional Declaration". They outlined a first provisional organization of public authorities, in which the SCAF largely prevailed and courts and chambers⁴⁹ were not mentioned.

Thus, from the viewpoint of the military announcing the suspension of the constitution signified asserting its power to other bodies likely to contest this new organization of public authorities. It meant that the unconstitutionality of the Declaration of February 13 in relation to the 1971 Constitution would not be recognized as a valid argument. Similarly, such an announcement allowed, if necessary, to dispel an argument of the coexistence between the constitutional law associated with the 1971 Constitution and that of the Constitutional Declaration. Finally, in case other organs would still have advanced these arguments, they would have been compelled to formulate another one aimed at justifying the illegality of 1971 Constitution's suspension. In other words, the SCAF's decision was designed to prevent the occurrence of a "constitutional conflict" and, in the event such a conflict would happen, to impose additional argumentative constraints on potential dissenting bodies.

Conclusion

For a lawyer, the interest of revolutionary outbreaks when accompanied with a constitutional breakdown depends on the conception of legal science he adopts. If he refers to a "normativist" view and considers law strictly as a source of constraint for actors, then it is true that there is no much to say. However, the perspective is different, if one conceives legal science as a tool to understand the reasoning of actors using legal discourse. Legal methodology allows indeed to offer a reconstruction of actors decision-making and to view this discourse as a communication medium particularly at destination of other institutional actors. Legal discourse's function appears to reintroduce intelligibility in a period where normal routines are disrupted, and can also act as a support for strategic-thinking, as the reconstruction of a universe of meaning enables to project oneself into the future. This has been illustrated here by a study of the outcome of the 25 January 2011 Revolution and of the behavior of the military and Mubarak. Through their Declaration of 11 February 2011, which broke with constitutional legality without attacking directly 1971 Constitution, the military asserted their sovereignty while preserving the possibility of resorting later to elements of the constitutional system associated with this text. A few hours later by resigning outside the constitutional framework, Hosni Mubarak recognized the army's action while making room for a return to power in the event the SCAF would restore constitutional legality. This scenario did not materialize as the military explicitly suspended 1971 Constitution two days later, through a "Constitutional Declaration". This decision was designed to consolidate the first rules that the military had laid out in the Declaration to establish their competence to manage temporarily the country. This persistence of legal discourse during the "Revolution" reflects the persistence of the state, the object of actors competing claims. Indeed, in order to seize and control the state, one must speak his language, that of law⁵².

⁴⁹ Point 4 of the Constitutional Declaration proclaimed the dissolution of the two Houses of Parliament.

⁵¹ Constitutional conflict's notion refers to a legal conflict between key constitutional bodies over the interpretation of fundamental norms relating to the organization of government. See BRAMI, Cyril et Jacky HUMMEL (dir.), *Les conflits constitutionnels : Le droit constitutionnel à l'épreuve de l'histoire et du politique*, Rennes, Presses Universitaires de Rennes, 2010..

⁵² WEBER, Max, *Economie et société*, (t.1), Paris, Pocket, 2003, p. 289.

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